A

Public Prosecutor v Hassan Ali a/l Abdul Razak

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42H-31–04 OF 2016
ZULKIFLI BAKAR J
23 AUGUST 2016

C *Criminal Procedure — Appeal — Appeal against sentence — Respondent convicted and sentenced to fine of RM5,000 for offence of having in possession of knife pursuant to s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 — Whether imprisonment term mandatory — Whether minimum sentence of five years imprisonment mandatory — Whether bond of good behaviour or imprisonment terms should be applicable — Reasons for amendment of s 6(1) of the Act — Corrosive and Explosive Substances and Offensive Weapons Act 1958 s 6(1)*

D

E The respondent, upon his plea of guilty, was convicted and sentenced to a fine of RM5,000 for the offence of having in his possession a knife ('the said offence') pursuant to s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('the Act'). Prior to his arrest for the said offence, the respondent had been convicted and sentenced for the offence of theft under

F s 380 of the Penal Code. Dissatisfied with the sentence imposed by the trial judge, the appellant filed the present appeal and prayed for the sentence to be enhanced. It must be noted that there was an amendment made in s 6(1) of the Act with regards to the sentence. The issues for court's decision were: (a) whether the imprisonment term mandatory; (b) whether the minimum

G sentence of five years imprisonment mandatory; (c) whether bond of good behaviour or imprisonment terms should be applicable; and (d) why the amendment being made.

Held, allowing the appeal; affirming the conviction and sentence imposed by

H the learned trial judge and in addition, sentencing the respondent to one year imprisonment:

(1) The use of the words 'shall be liable' in the law must be distinguished from the words 'shall be punished with'. With the words 'shall be

I punished with' used, it gives no discretion to the court. However, the court is vested with the discretionary power to pass sentence of imprisonment not more than the maximum as provided in the law when the phrase 'be liable' is used. It contained no mandatory connotation, likewise in this case. Since the words 'be liable' is used in the said s 6(1) of the Act, it is meant to allow the court with discretion to pass the sentence

as it thinks fit after assessing the available evidences and particular fact of the case. In other words, the imprisonment was not mandatory (see para 14).

(2) There is no provision or exception in the Act which oust the power of the court to make any order of binding over for good behaviour and also a review to be made for a special consideration for 'plead guilty'. Thus, it is still opened to the court to impose an order for a bond of good behaviour and for plead guilty cases the court has the wide discretion to impose any sentence based on sentencing principles. That makes the 'not less than 5 years imprisonment term' is not mandatory for plead guilty cases or otherwise. For the aforesaid reasons, the court had broad discretion to pass the imprisonment sentence of lesser than five years against the respondent upon assessing pivotal determinations of the relevant factors of this case in the interest of justice (see paras 16 & 25).

(3) The imprisonment term was suitable to be imposed because the respondent was capable of knowing and expected to know that the act of bringing the weapon in public place without authorisation or lawful purpose which had posed threats to the public safety. Bond of good behaviour would be suitable to be applied to the teenagers or who did not intend to cause injury to others, rather than a cognitive adult who was also caught to commit theft like the respondent (see paras 28 & 31).

(4) Based on the circumstances of the case, the fines imposed by the learned trial judge against the respondent had been lacking of deterrent effect, manifestly inadequate and improper. An enhanced sentence should be imposed to reflect the public abhorrence for the seriousness of this kind of offence as intended through the Parliament, nevertheless, in order to avoid miscarriage of justice and to strike a balance between public and private interest, the court took into consideration the guilty plea entered by the respondent based on its individual merits of the fact (see paras 34 & 38).

[Bahasa Malaysia summary

Responden, setelah mengaku bersalah, telah disabitkan dan dihukum denda RM5,000 kerana kesalahan memiliki pisau ('kesalahan tersebut') menurut s 6(1) Akta Bahan-bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 ('Akta tersebut'). Sebelum tangkapannya kerana kesalahan tersebut, responden telah disabitkan dan dihukum kerana kesalahan mencuri di bawah s 380 Kanun Keseksaan. Berasa tidak puas hati dengan hukuman yang dikenakan oleh hakim perbicaraan, perayu telah memfailkan rayuan ini dan memohon hukuman ditambah. Ia diambil kira bahawa terdapat pindaan yang dibuat pada s 6(1) Akta tersebut berkenaan hukuman. Isu-isu untuk keputusan mahkamah adalah: (a) sama ada tempoh penjara adalah mandatori; (b) sama ada hukuman minimum lima tahun penjara adalah mandatori; (c) sama ada

bon kelakuan baik atau tempoh penjara patut terpakai; dan (d) kenapa pindaan dibuat.

Diputuskan, membenarkan rayuan; mengesahkan sabitan dan hukuman yang dikenakan oleh hakim perbicaraan yang bijaksana dan sebagai tambahan, menghukum responden dengan satu tahun penjara:

(1) Penggunaan kata-kata 'shall be liable' dari segi undang-undang perlu dibezakan dengan kata-kata 'shall be punished with'. Dengan kata-kata 'shall be punished with' digunakan, ia tidak memberikan budi bicara kepada mahkamah. Walau bagaimanapun, mahkamah telah diberikan kuasa budi bicara untuk memutuskan hukuman penjara tidak lebih daripada maksimum yang diperuntukkan dari segi undang-undang apabila frasa 'be liable' digunakan. Ia tidak mengandungi konotasi mandatori, sepertimana dalam kes ini. Oleh kerana kata-kata 'be liable' digunakan dalam s 6(1) Akta tersebut, ia bermaksud untuk membenarkan mahkamah dengan budi bicara untuk membuat hukuman sebagaimana yang difikirkannya sesuai selepas menilai keterangan sedia ada dan fakta tertentu kes itu. Dalam erti kata lain, penjara bukan mandatori (lihat perenggan 14).

(2) Tiada peruntukan atau pengecualian dalam Akta tersebut yang membuang kuasa mahkamah untuk membuat apa-apa perintah yang mengikat untuk kelakuan baik dan juga semakan semula telah dibuat untuk pertimbangan khas bagi 'plead guilty'. Oleh itu, ia masih terbuka kepada mahkamah untuk mengenakan perintah bagi bon kelakuan baik dan bagi kes-kes pengakuan bersalah mahkamah mempunyai budi bicara yang luas untuk mengenakan apa-apa hukuman berdasarkan prinsip-prinsip penghukuman. Itu menjadikan 'not less than 5 year imprisonment term' tidak mandatori untuk kes-kes pengakuan bersalah atau sebaliknya. Bagi sebab-sebab tersebut, mahkamah mempunyai budi bicara yang luas untuk membuat hukuman penjara yang kurang daripada lima tahun terhadap responden selepas menilai penentuan penting faktor-faktor relevan kes ini demi kepentingan keadilan (lihat perenggan 16 & 25).

(3) Tempoh penjara sesuai dikenakan kerana responden mampu pengetahui dan dijangka untuk mengetahui bahawa tindakan membawa senjata di tempat awam tanpa kebenaran atau tujuan sah yang mendatangkan ancaman kepada keselamatan awam. Bon kelakuan baik adalah sesuai untuk digunakan kepada para remaja atau yang tidak berniat untuk mencederakan yang lain, dan bukan seorang dewasa kognitif yang juga telah ditengkap melakukan rompakan seperti responden (lihat perenggan 28 & 31).

(4) Berdasarkan keadaan kes, denda yang dikenakan oleh hakim perbicaraan yang bijaksana terhadap responden kurang kesan pencegahan, tidak

mencukupi dan tidak wajar langsung. Hukuman yang lebih berat patut dikenakan untuk menggambarkan kerisauan awam kerana keseriusan kesalahan jenis sebegini sepertimana dihasratkan melalui Parlimen, walau apa pun, bagi tujuan mengelak pelaksanaan ketidakadilan dan untuk membuat imbangan antara kepentingan awam dan peribadi, mahkamah mengambil pertimbangan pengakuan bersalah yang dimasukkan oleh responden berdasarkan merit individunya berhubung fakta itu (lihat perenggan 34 & 38).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 425–485.

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40; [1969] 1 LNS 98 (refd)
Ng Chwee Puan v Reg [1953] 1 MLJ 86 (refd)
PP v Abdul Halim bin Abd Samat [2014] 6 MLJ 144; [2014] 4 CLJ 12; [2014] 1 LNS 121, CA (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Lee Ah Sam (F) [1949] 1 MLJ 236 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45, HC (refd)
PP v Wahab [1964] 1 MLJ 265 (refd)
Peilis Sami v PP [2014] 6 CLJ 670, CA (refd)
Pepper v Hart [1993] AC 593, HL (refd)
R v Wills [1975] 1 WLR 292, CA (refd)
Tan Kay Beng v PP [2006] 4 SLR 10, HC (refd)
Teo Siaw Peng v PP [1993] 2 MLJ 364; [1993] 3 CLJ 412, HC (refd)
Zaidon bin Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

Legislation referred to

Corrosive and Explosive Substances and Offensive Weapons 1958 s 6(1)
Dangerous Drugs Act 1952
Penal Code s 380

Rozana bt Husin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
The respondent was self-represented.

Zulkifli Bakar J:

BACKGROUND

[1] This is an appeal by the public prosecutor ('the appellant') against the sentence imposed by the learned sessions court judge ('trial judge'). The accused ('the respondent') was convicted and sentenced to a fine of RM5,000 and if in default two months imprisonment.

[2] At the sessions court, the respondent was not represented by counsel. The respondent pleaded guilty to the charge as follows:

> Charge:
>
> Bahawa kamu pada 14/4/2016 jam lebih kurang 12.45 hours di Jalan Besar Pandamaran di dalam daerah Klang di dalam negeri Selangor didapati dalam milik kamu ada senjata berbahaya iaitu sebilah pisau berukuran 30cm berserta hulu tanpa maksud yang sah. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 6(1) Akta Bahan-bahan Kakisan, Letupan dan Senjata Berbahaya 1958 dan boleh dihukum di bawah seksyen yang sama.

[3] The facts of the case as presented are as follows:

(a) on 14 April 2016 at approximately 12.45pm, Tuan Nurul Halimi bin Hassan and his personnels ('the police') received a call from one Tan Soon Kiat ('Tan') who informed that the respondent was restrained by him at Jalan Besar Pandaraman, Klang, Selangor. According to Tan in his police report ('P2'), he identified the respondent from CCTV footage as the person who had stolen his wife's slippers and attempted to steal gold chains from the temple at Jalan Woon Ten Pandamaran on 13 April 2016; and

(b) on arrival at the place, the police conducted the body search on the respondent and a shaft knife with 30cm ('pisau berukuran 30cm berserta hulu') was found inside a bag branded PUMA which was in the respondent's possession.

[4] The respondent admitted to the facts and in his mitigation he stated:

> Pohon hukuman ringan. Saya baru dapat kerja pengawal jaga tangki air di Pandamaran. Saya ada ibu dan adik yang masih belajar di tingkatan 5. Saya yang tanggung mereka. Pisau itu untuk jaga keselamatan diri saya.
>
> (p 18, appeal record)

[5] After considering and weighing the facts and mitigation, the learned trial judge sentenced the respondent as above-mentioned. Being dissatisfied, the public prosecutor appealed against the said sentence and hence this appeal.

AT THE APPEAL IN THIS COURT

[6] Throughout the hearing of this appeal, the respondent was not represented by counsel. The respondent had been given opportunity to appoint counsel to represent him in this appeal. After several adjournments, the respondent decided not to engage counsel to represent him and decided to represent himself in the hearing of this appeal.

[7] Before this court, the appellant prayed for the sentence handed down by the learned trial judge to be enhanced.

[8] At this appeal, the appellant referred to the case of *Teo Siaw Peng v Public Prosecutor* [1993] 2 MLJ 364; [1993] 3 CLJ 412 and therefore agreed that the sentence of 'minimum 5 years imprisonment' is not mandatory.

[9] This court, on its own accord, informed the appellant that the words in the amended section was '*be liable* to imprisonment for a term *of not less than five years and not more than ten years*'. Thus, this court must find out the purpose of such amendment.

[10] For ease of reference, I laid down the *previous* provision of s 6(1) Corrosive and Explosive Substances and Offensive Weapons 1958 ('the Act') and amended s 6(1) of the Act as follows:

Previous Provision

(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction *be liable to imprisonment for a term not exceeding two years, and to whipping.* (Emphasis added.)

Amended Provision

(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction *be liable to imprisonment for a term of not less than five years and not more than ten years*, and to whipping. (Emphasis added)

With the amendment, it has only subsitituted the words 'not exceeding two years' with the words 'of not less than five years and not more than ten years'. The amendment was in force from 2 July 2014.

[11] The learned deputy public prosecutor handling this matter indicated that she wanted to do some researches on the issue of whether the minimum five years imprisonment sentence is mandatory. When this court resumed the hearing, the learned deputy public prosecutor did not render much assistance to this court, for examples to make comparison with some other laws such as

offence of rape in the Penal Code and offence under Dangerous Drugs Act 1952 which also provide the word 'not less than' in the section of the law. Instead, the learned deputy public prosecutor submitted that because of the word 'be liable' is used in the amendment, the sentence of *not less than* five years imprisonment is not mandatory.

FINDINGS OF THIS COURT

'Be liable' — is the imprisonment term mandatory?

[12] Perusing the grounds of judgment written by the learned trial judge, I am aware of the fact that the learned trial judge had referred to *Teo Siaw Peng* as precedent which elucidates that s 6(1) of the Act does not warrant the learned trial judge to make a mandatory imprisonment sentence against the respondent due to the words 'be liable' used within the section.

[13] In my considered view, the use of the words 'shall be liable' in the law must be distinguished from the words 'shall be punished with'. With the words 'shall be punished with' used, it gives no discretion to the court. However, the court is vested with the discretionary power to pass sentence of imprisonment not more than the maximum as provided in the law when the phrase 'be liable' is used. It contained no mandatory connotation, likewise in this case. The word 'liable' was explained by Brown J in the case of *Ng Chwee Puan v Reg* [1953] 1 MLJ 86 as follows:

> But the word *'liable' — contains no obligatory or mandatory connotation. Sitting in this court, with a table fan blowing directly on to me, I am 'liable' — to catch a cold. But it does not follow that I shall.* (Emphasis added.)

[14] Since the words 'be liable' is used in the said s 6(1) of the Act, this court ruled that it is meant to allow the court with discretion to pass the sentence as it thinks fit after assessing the available evidences and particular fact of the case. In other words, the imprisonment is not mandatory (*Public Prosecutor v Wahab* [1964] 1 MLJ 265; *Public Prosecutor v Lee Ah Sam (F)* [1949] 1 MLJ 236; *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68).

Specified minimum of not less than five years imprisonment term

[15] The next question arisen before this court is that if the court decides to impose a sentence of imprisonment and the term must be not less than five years as this amended provision prescribes a specified minimum term of imprisonment.

[16] On this issue, this court has consulted the *Hansard* to see the background for the amendment and the purpose of words used. It is on record

of the *Hansard* where YB Tuan Mohamed Hanipa bin Maidin (Sepang) had suggested to the Deputy Minister YB Datuk Dr Haji Wan Junaidi Tuanku Jaafar that a specific provision to be provided in the said section of the law to oust the power of the court to make any order of binding over for good behaviour and also a review to be made for a special consideration for 'plead guilty' cases (p 86, DR 10/4/2014). With respect, I do not find such provision or exception in the said law. Therefore, it is still opened to the court to impose an order for a bond of good behaviour and for plead guilty cases the court has the wide discretion to impose any sentence based on sentencing principles. That makes the 'not less than 5 years imprisonment term' is not mandatory for plead guilty cases or otherwise. In other words, the court's hands are not tied by the 'minimum of not less than 5 years imprisonment term'. This purposive interpretation of the said law does not lead to absurdity.

[17] To further support my above finding is that, YB Deputy Minister Datuk Dr Hj Wan Junaidi Tuanku Jaafar had replied and I reproduce such as follows:

> Timbalan Menteri Dalam Negeri [Datuk Dr. Haji Wan Junaidi Tuanku Jaafar]:
>
> Datuk Dr. Haji Wan Junaidi Tuanku Jaafar: Tuan Yang di-Pertua, penjelasan saya ini sahajalah. Selepas itu nanti tetapi belum lagi Tuan Yang di-Pertua. Saya hendak bagi penjelasan. Sebenarnya saya mengetahui bahawa rang undang-undang ini dibentangkan di Dewan ini, baca kali yang pertama pada 25 September 2013. Jadi, kalau kita benar-benar serius, saya bukan menuduh Yang Berhormat ya. *Serius hendak meminda ataupun mengisi perkara lain. dalam ini, berapa bulan yang kita ada boleh pinda. Akan tetapi kenapa sekarang pula hendak minta saya pinda? Jadi Tuan Yang di-Pertua, balik kepada apa yang saya sebut tadi. Tunggulah apa yang berlaku selepas ini nanti*. Kita lihat Yang Berhormat. Terima kasih.
>
> [Fasal-fasal 1 hingga 3 diperintahkan jadi sebahagian daripada Rang undang-undang]
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> [Rang undang-undang dimaklumkan kepada Majlis sekarang]
>
> [Majlis Mesyuarat bersidang semula]
>
> [Rang undang-undang dilaporkan dengan tidak ada pindaan; dibacakan kali yang ketiga dan diluluskan]' taken from D.R. 10/4/2014. (Emphasis added.)

[18] Pursuant to the above, I am of the considered view that the YB Deputy Minister has agreed to allow the judicial discretion to continue and in future the law can be amended to oust the judicial discretion if the need be. Moreover, I noted the primary goal of the amendment is to reduce the crimes by way of deterrence to protect the community. For this purpose, it could be achieved since the term of the sentence to be imposed has been enhanced by the law in order to warn the criminal or criminals to be cautious towards the penalty that awaits if one commits the offence.

[19] Nevertheless, deterrence to the respondent it has to be, this court did consider that there is still a judicial discretion to the respondent who had pleaded guilty to the charge. I am of the view that a guilty plea should also be considered by the court along with the prevalence of the offence before passing sentence. The guilty plea has indeed saved costs and enabled the case to be disposed of expeditiously.

[20] However, I would like to emphasise the guilty plea whether having a mitigating value also depended on its fact as to whether the respondent has any previous conviction. If, the respondent is a first offender the court should give credit for a lesser sentence to be imposed (*Zaidon bin Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441). This court agrees with Visu Sunnadurai J (as he then was) in the case of *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45 as follows:

> The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in Mohamed Abdullah *Ang Swee Kang v Public Prosecutor* . The Supreme Court adopted with approval the views expressed by Cumming-Bruce LJ in *R v Boydvwhere* he said:
>
> > The policy of the court is that where a man does plead guilty, *which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one*, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty.
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> Similarly in the earlier Federal Court decision of *Sau Soo Kim v Public Prosecutor* at p 137, Lee Hun Hoe CJ (Borneo) said:
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> > *Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.*
>
> The Supreme Court in *Abdullah Ang*'s case also held that a plea of guilty will entitle the accused person to a discount of between one-quarter to one-third of the sentece. Mohamad Azmi SCJ in delivering the judgment of the Supreme Court said at p 171: 'It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence'. *His Lordship also pointed out that failure on the part of a judge in not granting credit or discounts may result in the judge not exercising his discretion in sentencing judicially.*
>
> The credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and had been found guilty. Cumming-Bruce LJ in *R v Boyd* above said: *'So one askes oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence?'*
>
> Such a test was also adopted and applied by the Supreme Court in *Abdullah Ang*'s

case. See also Stockdale & Delvin, *Sentencing, The Criminal Law Library* (No 5) (1987) para 2.23 and also 11 *Halsbury's Laws of England* (4th Ed) para 483.

Therefore, in applying the above principles of sentencing, the accused in the present case would be entitled to a discount or credit from a sentence which they would have obtained had they not pleaded guilty and had been convicted.

It is therefore necessary for me to consider now what sentence would have been an appropriate sentence had they plead not guilty and had been convicted. (Emphasis added.)

[21] Moreover in my considered opinion, I do not think the Parliament had intended to make the judges to wear a straitjacket and to act as a robot without humanity for an accused who had expressed his remorse by pleading guilty at the first available opportunity.

[22] Even the previous courts had expressed this view as guidance for subsequent courts, each and every sentencing judge must still have pondered such, as in the case of *R v Wills* [1975] 1 WLR 292, where it was held as:

This case presented Judge Streeter with a difficult sentencing problem. The experience of this court is that judges differ considerably in the way they deal with this kind of case. The single judge suggested that this court might think this an appropriate occasion for giving some guidance to judges. *We will try to do so; but we wish to stress that our experience has been that these cases tend to differ widely in their facts.* Nothing we say in this judgment should be taken as a desire on our part to put judges into sentencing strait-jackets. (Emphasis added.)

[23] It is crystal clear that this court can exercise its unfettered discretion provided the sentence to be made is 'according to law'. In the case of *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, Mohamed Azmi J (as he then was) expressed the correct stand for the sentencing principle:

A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is *whether the convicted person is a first offender*. It is for this purpose that before passing sentence, a magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences committed previously were of similar nature as the one with which he is presently charged. The court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then *it is in the interest of justice that a deterrent sentence should be passed and, in such a case, unless there are exceptional circumstances, the quantity, nature or value of the subject-matter of the offence with*

which he is currently charged can very rarely constitute a mitigating factor. (Emphasis added.)

[24] To my mind, the relevant aggravating and mitigating factors, the gravity of the offence and public interest must be taken into account before the court determines the limits of the range of the imprisonment sentence to be imposed against the respondent, in complying with the sentencing principle. Raja Azlan Shah J (as he then was) said in the case of *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98:

> ... It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. *In assessing sentence, the primary consideration is the character and magnitude of the offence, but the Court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case*. (Emphasis added.)

[25] For the above-mentioned reasons, it is a settled position that the court has broad discretion to pass the imprisonment sentence of lesser than five years against the respondent upon assessing pivotal determinations of the relevant factors of this case in the interest of justice.

Bond of good behaviour or imprisonment terms?

[26] I have taken note that the reasons given by the respondent was that he brought the weapon for his working purpose as a security guard. I have never heard that as a security guard was given a permission to be armed with a knife as such for self-protection. Instead, a security guard would have been given briefing and training for self-protection skills and armed with certain equipments supplied by the security guard company. There is no necessity for him to bring the shaft knife on his own for his working purpose.

[27] This court has also taken into account the age of the respondent who was 26 years old during the incident and was fully capable of having ability to know what is right and what is wrong. And, surely the security company must have informed him when he was employed about the 'dos and don'ts'.

[28] It is my view that the imprisonment term is suitable to be imposed in this case because the respondent is capable of knowing and expected to know that the act of bringing the weapon in public place without authorisation or lawful purpose which has posed threats to the public safety. To me, the respondent is responsible for his own action.

[29] As enunciated by the Court of Appeal in the case of *Public Prosecutor v Abdul Halim bin Abd Samat* [2014] 6 MLJ 144; [2014] 4 CLJ 12; [2014] 1

LNS 121, it is justified to invoke bond for good behaviour whenever the court has made appropriate consideration of all the relevant factors based on the nature of each individual case. It was held as follows:

> [14] In his submissions, learned counsel placed great reliance on the case of *Nor Afizal Azizan v Public Prosecutor* to say that s 294 of the CPC is punitive in effect and amounts to a form of punishment being inflicted on the offender. We find that learned counsel's reliance on the case of *Nor Afizal Azizan v Public Prosecutor* is misplaced. *We say this because although we cannot deny the fact that an order under s 294 of the CPC is in fact punitive in nature we must not lose sight of the fact that each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s 294 of the CPC, binding over in all the circumstances of the case is expedient.* (see *Public Prosecutor v Lim Guan Hock, Public Prosecutor v Boo Swee Kim* [1949] MLJ 231; and *Lim Kim Poh v Public Prosecutor* [2000] 3 MLJ 411; [2000] 8 CLJ 328). It must be recognised that no two cases are alike, and that the facts must necessarily vary from case to case. *At the end of the day, each case has to be decided on its own merits.* (Emphasis added.)

[30] In my considered judgment, the order for binding over is not necessary to be applied to every case and it is not suitable to be invoked against the respondent in the instant case because:

(a) the respondent had been convicted under s 380 Penal Code committing theft in the temple (Klang Magistrate Court: MM3-83RS-132–4 of 2016) and sentenced to two months imprisonment from the date of arrest (13 April 2016). This offence was committed a day before the respondent was arrested for the offence in the case in this appeal. Hence, it is reasonable to infer the purpose of the respondent bringing the weapon is not 'purely innocent for self-protection' as he claimed; and

(b) the respondent informed the trial court that he was working as security guard to secure the water tank proximity where there is no danger rendering him to have a lawful means for bringing such weapon at public place.

[31] Therefore, bond for good behaviour, in my opinion, would be suitable to be applied to the teenagers or who does not intend to cause injury to others, rather than a cognitive adult who was also caught to commit theft like the respondent in this case. In short, the respondent has to take consequences for the offence he had committed until and unless there is an exceptional circumstance proven otherwise.

Why the amendment being made?

[32] To determine the rationale behind the amendment, this court had also referred to the *Hansard* in order to understand the Legislature's intention. In

Pepper v Hart [1993] AC 593, the court had adopted the purposive approach by looking at the extraneous material to give effect of construing the true purpose and background for the enactment or construction of the legislation. Lord Griffiths in the *Pepper* said as follows:

> The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult *Hansard* to see if there is a clear statement of the meaning that the words were intended to carry. *The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislature was enacted ... In summary, I agree that the courts should have recourse to Hansard in the circusmtances and to the extent he proposes.* (Emphasis added.)

[33] Consulting the *Hansard*, this court recognises the existence of gangsterism activities that are inherently dangerous and increasingly characterised by violence. This amendment provided for a harsher sentence in respect of the terms of the imprisonment and its purpose is to reduce or eliminate the gangsterism and criminal activities in our society. Notably, the reasons given for agreeing with the amendment in the sitting are, inter alia, as follows:

(a) YB Dato' Hj Mohd Zaim bin Abu Hasan (Parit) said:

> Selain daripada isu jenayah senjata api yang semakin serius, jenayah samseng dalam kalangan para remaja dan pelajar adalah antara salah satu isu jenayah yang harus diberi perhatian yang khusus. Keadaan ini menjadi lebih buruk lagi apabila ada kumpulan kongsi gelap yang mengambil kesempatan untuk memperkembangkan aktiviti mereka dengan menjadikan golongan pelajar sebagai sasaran untuk dijadikan ahli mereka. Dalam proses menggerakkan aktiviti mereka, penggunaan bahan dan senjata terlarang seperti dinyatakan dalam akta ini merupakan instrument yang lazim digunakan oleh mereka. (p 46, DR 10 April 2014);

(b) YB Dato' Hasbullah bin Osman (Gerik) said:

> Pertama, untuk penambahbaikan untuk langkah pencegahan yang mana dilakukan oleh penjahat-penjahat atau pengganas-pengganas yang memberi kesan kepada rakyat. Saya juga melihat langkah kita hendak mengubah penalti ini ialah untuk kesedaran masyarakat bahawa membuat perkara ini, dapat hukuman yang setimpal walaupun sebelum ini kita sudah ada hukuman. Ketiga, kita lihat kuasa diberikan kepada polis, penguat kuasa undang-undang dalam hendak mensabitkan kesalahan kerana merekalah sebagai pasukan yang menjaga keselamatan negara dan memastikan keamanan dalam negara. Peristiwa-peristiwa yang berlaku yang kita lihat dalam keganasan, terlibat soal pergaduhan, menggunakan parang, ditetak di

sana sini. (p 49, DR 10 April 2014); and

(c) YB Dr Hj Noor Azmi bin Ghazali (Bagan Serai) said:

> Jadi rakyat sekarang telah menjadi satu ketakutan bagi rakyat. Mungkin satu ketika nanti rakyat terpaksa keluar dengan memakai baju kalis peluru atau pun menyediakan alarm system yang canggih dan sebagainya untuk menjaga diri masing-masing. Ketakutan ini juga akan menimbulkan ke tekanan dalam hidup yang mana tekanan dalam hidup ini akan membawa juga kepada penyakit-penyakit kronik yang mana akan menjejaskan prestasi mereka. Keadaan begini juga akan mungkin satu hari akan menjejaskan ekonomi di negara kerana akan menjejaskan peluang untuk pelancong-pelancong datang kerana ketakutan dan sebagainya. Tidak cukup dengan kes membunuh dengan kejam menggunakan senjata api di tempat awam, rakyat Malaysia juga dikejutkan juga dengan beberapa insiden mengamuk di tempat awam. Antaranya seorang lelaki dan wanita dikatakan mengamuk sambil melibas pedang samurai di Kompleks B Jabatan Perdana Menteri. Terbaru kes amuk sehingga menikam orang awam di stesen LRT pada Oktober lalu yang meragut nyawa orang awam. (p 53, DR 10 April 2014)

[34] As such in my view, the fines imposed by the learned trial judge against the respondent has been lacking of deterrent effect since the criminal activities are springing up like mushrooms after the rain. It has justified this court to interfere with the learned's trial judge's order since this court considers that the sentence passed is manifestly inadequate and improper based on the circumstances of the case (*Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193).

[35] On this account, the court is obliged to demonstrate the right message as regards to the seriousness of the offence through appropriate sentence imposed on the offender. It is paramount that the punishment must reflect the public adhorrence towards the crime and also to deter others from committing the similar crimes. The public would expect the courts to hand down sentences that is commensurate with the seriousness of the offence. The Court of Appeal had said in *Peilis Sami v Public Prosecutor* [2014] 6 CLJ 670:

> [20] Now, on the question of deterrence, let it be said here that we take judicial notice that statutory rapes are rampant nowadays. Therefore, we consider it to be our solemn duty that by this judgment we should take the opportunity to issue a message to the public. So, we have this to say. The courts in considering what ought to be the appropriate sentence in cases of statutory rapes must never for a moment lose sight of the fact that they have a duty to protect young girls such as the complainant in the instant case from unscrupulous men such as the appellant, always on the prowl to take sexual advantage of female minors. *Hence, the courts must take a stern view of such offences, and in passing out sentences, the courts must give out the correct message to the public, that the courts view such offences with much detestation.* (Emphasis added.)

[36] I found the learned trial judge had erred in imposing the inadequate and inappropriate sentence as stated above, thus it provides reason for this court to interfere. In the instant case, the fact as advanced by the appellant that the respondent had been convicted for committing theft in the temple where he was seen and arrested is an aggravating factor. Not only that, the respondent could not give any reasonable explanation as to why he must bring the weapon where he was only working to guard at the 'water tank' which is not a normal target for robbery. This culpable conduct is not trivial as the weapon he brings along can be used to commit crimes and able to injure the public enabling this court to find the fine imposed is manisfestly insufficient against the respondent in the circumstances. Particularly the respondent had indeed committed the offence under s 380 of the Penal Code other than the offence in this appeal.

[37] I agree with the proposition stated in the case of *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR 10 where the High Court said as follows:

> [36] *Our settled sentencing jurisprudence recognises that a timeously-effected plea of guilt merits a sentencing discount in certain situations. A guilty plea is relevant as a mitigation factor (a) when the plea of guilt is a genuine act of contrition* — see *Xia Qin Lai v Public Prosecutor* [1999] 4 SLR 343 at [26] and (b) *when resources which would otherwise be expended at trial are saved* — see *Krishan Chand v Public Prosecutor* [1995] 2 SLR 291 at 293[6] and Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2nd Ed, 1995) at p 137. The discount given may range between a quarter to a third of what would otherwise be an appropriate sentence though this is by no means either a hard and fast rule nor an entitlement — see eg, *Fu Foo Tong v PP* [1995] 1 SLR 448 at 455[13].
>
> [37] *It is pertinent to note that the value of a guilty plea is substantially attenuated when (a) the plea is tactical* — see *Xia Qin Lai v PP* ; (b) there is no other choice but to plead guilty — see *Wong Kai Chuen Philip v PP* [1990] SLR 1011; and (c) where the *public interest considerations* nevertheless necessitate a deterrent sentence — see *Fu Foo Tong v PP* . (Emphasis added.)

[38] Be that as it may, in this case, it appears to this court that an enhanced sentence should be imposed to reflect the public adhorrence for the seriousness of this kind of offence as intended through the Parliament. Imprisonment order is evidently justified to deter the respondent from reoffending as well as to deter others of his ilks. Notwithstanding that, in order to avoid miscarriage of justice, this court takes into account the guilty plea entered by the respondent based on its individual merits of the fact. This court has then shown its merciful and hastened to exercise its discretion sparingly in order to strike a balance between public and private interests. In the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, it was decided that:

> *The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused*. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560 561 offered some good advice when he said:

The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. (Emphasis added.)

CONCLUSION — DECISION AT THIS APPEAL

[39] This appeal is hereby allowed. The conviction and sentence imposed by the learned trial judge is affirmed and, in addition to that, the respondent is sentenced to imprisonment for one year under s 6(1) of the Act. The respondent had served the two months imprisonment term in default to pay the fine. The additional one year imprisonment term is to run from the date of the order of this court.

[40] However, after perusing the notice of appeal, I have to highlight that the notice of appeal filed by the appellant (public prosecutor) dated 1 August 2016 had wrongly stated that the appeal was dismissed by this court whereas this court had allowed the public prosecutor's appeal. As set out above in my judgment, I have laid down my reasons for allowing the appellant's appeal before this court as per the order dated 25 July 2016.

Appeal allowed; conviction and sentence imposed by learned trial judge affirmed and in addition respondent sentenced to one year imprisonment.

Reported by Dzulqarnain Ab Fatar